(2)

MAR 23 1998

CLERK

No. 97-1025

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID S. HESS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel
JACK D. SMITH
Deputy General Counsel
ANN S. DUROSS
Assistant General Counsel
COLLEEN BOLES
Senior Counsel
JEROME A. MADDEN
J. SCOTT WATSON
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

23 pp

QUESTION PRESENTED

Whether the common law doctrine first enunciated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), has been statutorily supplanted with respect to claims based on transactions that occurred before the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	3
Argument	6
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Atherton v. *FDIC*, 117 S. Ct. 666 (1997)	3
Briggs v. *Spaulding*, 141 U.S. 132 (1891)	3
Carpenter v. *FDIC (In re Carpenter)*, 205 B.R. 600 (B.A.P. 9th Cir. 1997)	11
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981)	9
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	2, 4, 8
DiVall Insured Income Fund Ltd. v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398 (8th Cir. 1995)	6
Duraflex Sales & Serv. Corp. v. *W.H.E. Mech. Contr.*, 110 F.3d 927 (2d Cir. 1997)	10-11
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	3
First Union Nat'l Bank of Florida v. *Hall*, 123 F.3d 1374 (11th Cir. 1997), petition for cert. pending, No. 97-1296	10
Hess v. *FDIC*, cert. granted, 117 S. Ct. 760 (1997)	2, 3
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	8
Ledo Financial Corp. v. *Summers*, 122 F.3d 825 (9th Cir. 1997)	6
Murphy v. *FDIC*, 38 F.3d 1490 (9th Cir. 1994)	7
Murphy v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995)	6

Cases—Continued: Page

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 2, 4
RTC v. *Kennelly*, 57 F.3d 819 (9th Cir. 1995) 7
United States v. *Texas*, 507 U.S. 529 (1993) 9
Young v. *FDIC*, 103 F.3d 1180 (4th Cir.), cert. denied, 118 S. Ct. 329 (1997) 6, 7

Statutes:

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 2
12 U.S.C. 1821(d)(9) 7, 8
12 U.S.C. 1821(d)(9)(A) 5, 6, 8, 10
12 U.S.C. 1823(e) 5, 6, 7, 8, 9, 10, 11

Miscellaneous:

62 Fed. Reg. 5984 (1997) 7

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1025

DAVID S. HESS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The most recent opinion of the court of appeals (Pet. App. 1a-10a), sitting en banc, is reported at 120 F.3d 1140. The court's previous en banc opinion (96-106 Pet. App. 1a-55a) is reported at 83 F.3d 1317, and its initial panel opinion (96-106 Pet. App. 56a-73a) is reported at 39 F.3d 292.[1] The orders of the district court dismissing petitioners' complaint (96-106 Pet.

[1] Like petitioners, we refer to those opinions as they were reprinted in the appendix to the petition from the court of appeals' first en banc opinion, copies of which petitioners have lodged with the Court in connection with the present petition. See Pet. 2 n.1.

App. 76a-83a) and denying petitioners' motions for rehearing and for leave to amend their complaint (96-106 Pet. App. 74a-75a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1997. On November 5, 1997, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 18, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Our brief on behalf of the Federal Deposit Insurance Corporation (FDIC) in opposition to the first petition in this case, *Hess* v. *FDIC*, No. 96-106, set out (at 2-7) the history of the common-law doctrine first articulated by this Court more than 50 years ago in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). It explained (at 3-6) related statutory developments through the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, and described (at 6-7) this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). That brief also discussed in some detail (at 7-14) the facts and procedural history of this case, including the court of appeals' first en banc opinion. We have lodged ten copies of our brief in No. 96-106 with the Clerk, compare Pet. 2 n.1, and we have reprinted, as an appendix to this brief, a February 1997 FDIC policy statement that also includes a brief review of the history of *D'Oench* and its statutory analogues. App., *infra*, 2a-4a.

2. In January 1997, this Court granted the petition in No. 96-106, vacated the court of appeals' judgment, and remanded the case to that court for reconsideration in light of the Court's decision the previous week in *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997). *Hess* v. *FDIC*, 117 S. Ct. 760 (1997). After entertaining new briefing concerning the effect of the decision in *Atherton*, the en banc court of appeals reinstated its prior opinion and its judgment affirming the district court's dismissal of petitioners' complaint. Pet. App. 1a-10a.

The court of appeals observed (Pet. App. 4a) that "[t]he issue in *Atherton* was whether courts should look to state law, to federal common law, or to 12 U.S.C. § 1821(k), a provision of FIRREA, to determine what the standard of care [was] for federal bank officers and directors" who were sued by a federal receiver after their institution failed. The court explained *Atherton*'s conclusion that the federal common-law standard of care articulated in *Briggs* v. *Spaulding*, 141 U.S. 132 (1891), had not survived the later decision in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), and its determination that no federal interest justified the creation of a new federal common-law rule. Pet. App. 4a-5a. The court pointed out that *Atherton*'s "only preemption analysis" concerned "whether § 1821(k) set the sole standard of care for federal bank officers and directors, thus preempting state law," in the absence of any applicable federal common-law rule. *Id.* at 5a.

From its review of this Court's decision, the court of appeals concluded that "*Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine." Pet. App. 5a. The court noted

that the facts in *Atherton* "implicated the preexisting federal common law rule announced in *Briggs*." *Ibid.* It explained, however, that

> rather than addressing whether § 1821(k) displaced the *Briggs* rule, the [opinion in *Atherton*] explicitly set § 1821(k) to the side and addressed the different issue of whether *Briggs* survived *Erie*. After concluding that *Briggs* did not survive, thus leaving no federal common law regarding the standard of care, the Court obviously never reached or addressed any issue of statutory abrogation of federal common law. Thus, in *Atherton*, as in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994), the Court's analysis focused on determining whether to *create* federal common law.

Id. at 5a-6a (footnote omitted). The court observed that the *D'Oench* doctrine, unlike the *Briggs* rule, "was first articulated by the Supreme Court in 1942, after *Erie*," in a decision that "examined the Federal Reserve Act and identified a significant federal interest and policy which warranted the creation of a federal common law rule." *Id.* at 6a-7a, citing *D'Oench*, 315 U.S. at 459-460. In the court of appeals' view, therefore, the issue in this case was "not whether the *D'Oench* doctrine survived *Erie*, but rather whether Congress intended FIRREA to supplant" that doctrine. Pet. App. 6a. On that issue, the court "continue[d] to believe that the analysis set forth in [its] prior en banc opinion reflects the most reasonable reading of Congress's intent—*i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine." *Id.* at 8a.

Having complied with this Court's instruction to reconsider its decision in light of *Atherton*, the court of appeals briefly disposed of several additional arguments raised by the parties on remand. Pet. App. 8a n.6. The court rejected (*ibid.*) petitioners' argument that a congressional intent to displace *D'Oench* could be inferred from the enactment of 12 U.S.C. 1823(e) in 1950, finding "no indication" of any such intention. Similarly, the court rejected petitioners' argument based on the 1989 enactment, as part of FIRREA, of 12 U.S.C. 1821(d)(2)(H), which requires the FDIC as receiver to "pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." On that point, the court "agree[d] with the FDIC * * * that § 1821(d)(2)(H) does not indicate a congressional intent to displace the *D'Oench* doctrine," but rather "assumes that the claims in question are valid and addresses only the manner in which valid claims are to be paid." Pet. App. 9a n.6. The court noted (*ibid.*) the then-recent issuance by the FDIC's Board of Directors of a policy statement concerning the interpretation of 12 U.S.C. 1821(d)(9)(A), also enacted by FIRREA, and remarked that if the position expressed in that statement were correct, then the FDIC would prevail in this case without regard to whether or not FIRREA displaced *D'Oench*. Finally, the court declined to address the FDIC's position on the retroactivity of any relevant provisions of FIRREA, because it concluded that *D'Oench* in any event survived the enactment of FIRREA and bars petitioners' claims. Pet. App. 10a n.6.

ARGUMENT

1. All of the events giving rise to the underlying state-law claims that petitioners seek to pursue in this case took place before the enactment of FIRREA in August 1989. See Pet. 5-7. Petitioners do not contend in this Court that the court of appeals erred in holding (96-106 Pet. App. 28a-53a) that the *D'Oench* doctrine, as applied before FIRREA, would bar maintenance of those claims against the FDIC as receiver for a failed bank, or that that question would merit this Court's review. They argue instead (Pet. 14-22) that the Court should grant review to resolve a conflict in the circuits concerning whether FIRREA's amendment of 12 U.S.C. 1823(e) and addition of 12 U.S.C. 1821(d)(9)(A) had the effect of wholly displacing the common-law *D'Oench* doctrine.[2] Compare Pet. App. 8a, 96-106 Pet. App. 14a-28a, and *Young* v. *FDIC*, 103 F.3d 1180 (4th Cir.), cert. denied, 118 S. Ct. 329 (1997), with *DiVall Insured Income Fund Ltd.* v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398 (8th Cir. 1995), and *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995); see also *Ledo Financial Corp.* v. *Summers*, 122 F.3d 825, 829 & n.2 (9th Cir. 1997) (holding that, on given facts, *Atherton* and *O'Melveny* precluded application of *D'Oench* doctrine), petition for reh'g pending (filed Oct. 3, 1997).[3]

---

[2] FIRREA's amendments are discussed, and the present statutory language is set out in pertinent part, in the FDIC policy statement discussed below and reprinted in the Appendix to this brief. See App., *infra*, 3a-4a; see also 96-106 FDIC Br. in Opp. 5-6.

[3] The FDIC's petition for rehearing in *Ledo* seeks revision, by the panel or the full court, of the panel majority's conclusion that it could properly conclude, without "overruling" *D'Oench*, that *O'Melveny* and *Atherton* led to the conclusion that there

As we explained in our brief in opposition to petitioners' first petition, however, this case does not present that issue. 96-106 FDIC Br. in Opp. 14-18; see also FDIC Br. in Opp. in *Young* v. *FDIC*, No. 97-65, at 6-8 (cert. denied, 118 S. Ct. 329 (1997)). Whether or not FIRREA supplanted *D'Oench* completely with respect to defenses or claims based on unwritten agreements allegedly entered into after FIRREA's enactment, it cannot be said to have supplanted the previously existing common law with respect to defenses or claims, like petitioners', based on alleged unwritten agreements predating FIRREA. The relevant statutory provisions added or amended by FIRREA, 12 U.S.C. 1821(d)(9) and 1823(e) (as amended), do not govern transactions that occurred before they were enacted.

As the FDIC explained in a Statement of Policy issued in February 1997, 62 Fed. Reg. 5984 (reprinted at App., *infra*, 1a-8a), no provision of FIRREA addresses the temporal reach of new Section 1821(d)(9) or amended Section 1823(e), and application of those provisions to agreements made before the statute was enacted would alter the rights that the parties to

---

was no longer a sufficient federal interest to apply the common law rule to pre-FIRREA transactions. See also *RTC* v. *Kennelly*, 57 F.3d 819, 822 n.3 (9th Cir. 1995) (dictum) ("There is serious doubt whether *D'Oench, Duhme* survives *O'Melveny & Myers* v. *FDIC*."); but see *Murphy* v. *FDIC*, 38 F.3d 1490, 1500-1501 (9th Cir. 1994) (en banc) (accepting FDIC's concession that relevant FIRREA amendments could not be applied retroactively). The Ninth Circuit has not decided a case applying the FIRREA amendments to post-FIRREA transactions.

those agreements possessed when they acted.[4] Under the principles articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), Congress is therefore presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA. See App., *infra*, 6a-7a. Agreements made before that time, including the purported agreements or representations on which petitioners rely (see Pet. 6-7), are subject to pre-FIRREA law, including the federal common law then well established under *D'Oench*.[5]

---

[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC, or a defense against the FDIC as receiver, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of Section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460. For example, a borrower might rely on a written agreement executed by the bank's president and kept in its files, but not approved by its board of directors or loan committee. Application of Section 1821(d)(9) and the expanded version of Section 1823(e) (as amended by FIRREA) would retroactively eliminate that right.

[5] If Section 1821(d)(9)(A), which was added by FIRREA, did apply to this case, it would bar petitioners' claims. That Section provides in pertinent part that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC in its corporate capacity]." See App., *infra*, 4a-5a (discussing applicability of Section 1821(d)(9)(A) to purported liabilities of a failed institution). Petitioners do not claim that Southeast Bank's alleged agreement to "conduct periodic audits [of petitioner Hess's business] and contact [petitioner] immediately upon discovering" improper sales (Pet. 6) met any of the

Petitioners argue (Pet. 20-21) that a *Landgraf* analysis is inapposite in this case because the issue is "whether to *fashion* a common law rule" (Pet. 21) (emphasis added). That is not correct. As the court of appeals emphasized (Pet. App. 5a-6a), the issue before that court in this case was not, as in *Atherton* or *O'Melveny*, "whether [to] *create* federal common law" (*id.* at 6a), but rather whether to apply a well established body of federal common law to the facts of the case, in light of a claim that statutory changes enacted after the completion of the primary conduct at issue should be held to have "displaced" the common-law rule. The logical first step in addressing *that* claim is the retroactivity analysis set out above, and the correct conclusion is that any "displacement" claim is not properly presented on the facts of a pre-FIRREA case.[6]

---

requirements enumerated in Section 1823(e). See also 96-106 FDIC Br. in Opp. 19-22.

[6] The same analysis disposes of petitioners' argument (Pet. 22-28) that the decision below reflects some "lack of clarity" or "confus[ion]" (Pet. 23) concerning the relationship between this Court's decisions in *O'Melveny*, *United States* v. *Texas*, 507 U.S. 529 (1993), and *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). As the court of appeals lucidly explained (Pet. App. 4a-6a, 8a), the difference is that cases like *Texas* (and *Milwaukee*) involve determining whether a new statute should be deemed to abrogate *old* common law, while cases like *O'Melveny* (and *Atherton*) involve determining whether it would be appropriate under particular circumstances to create *new* common law. As we argue in the text, we think this case is most easily resolved on retroactivity grounds, obviating any need to reach the "displacement" question. Having chosen to address the "displacement" question, however, the court of appeals considered it within the correct analytical framework, and reached the correct result.

In any event, even if the *D'Oench* doctrine's application to transactions preceding FIRREA were open to serious question, the matter would not warrant this Court's review. Cases involving oral agreements or representations allegedly made in connection with such transactions comprise a finite set that is rapidly diminishing over time, and the FDIC's recent policy statement makes clear that the FDIC will not assert the common-law *D'Oench* doctrine in cases involving post-FIRREA transactions. See App., *infra*, 7a-8a. Whether the doctrine continues to apply in pre-FIRREA cases is therefore a question of little continuing importance.[7] Petitioners' remaining argu-

---

[7] With the possible exception of the FDIC's pending en banc petition in *Ledo Financial*, the FDIC is aware of no case pending in a court of appeals, and of only one case pending in a district court, involving the possible application of *D'Oench* to pre-FIRREA facts that might arguably not be covered by the FIRREA amendments. The primary dispute concerning the coverage of those amendments is whether new Section 1821(d)(9)(A) applies only in cases that involve an identifiable bank "asset." Compare, *e.g.*, Pet. 22 & n.13 with App., *infra*, 4a-6a. Petitioners' suggestion (Pet. 19 & n.10) that the question presented here continues to arise frequently, based on a count of Westlaw citations in recent years, is unpersuasive. First, petitioners' case-count does not distinguish "asset" cases, which are far more common, from the relevant "no asset" cases. Moreover, the FDIC informs us that, over the period petitioners measure, the total number of appellate decisions involving either Section 1823(e) or *D'Oench* fell from 16 in 1994 to five in 1997. Of those five, only *Ledo* and *Young* arguably involved displacement of the common law by FIRREA. Compare *First Union Nat'l Bank of Florida* v. *Hall*, 123 F.3d 1374 (11th Cir. 1997) (counterclaim raised as defense to a suit to collect on an asset acquired from the FDIC), petition for cert. pending, No. 97-1296 (filed Jan. 28, 1998); *Duraflex Sales & Serv. Corp.* v. *W.H.E. Mech. Contr.*, 110 F.3d 927 (2d Cir.

ments (Pet. 22)—that the Eleventh Circuit might decline to accept the FDIC's waiver of reliance on *D'Oench* in some future case, or that legitimate disputes may arise concerning the proper interpretation of the FIRREA amendments in a case to which they apply—amount to little more than an attempt to characterize this case as a suitable vehicle to resolve, in advance, issues that may or may not arise in future litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

WILLIAM F. KROENER, III
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN BOLES
Senior Counsel

JEROME A. MADDEN
J. SCOTT WATSON
Counsel
Federal Deposit Insurance Corporation

MARCH 1998

1997) (decided under state law); *Carpenter* v. *FDIC (In re Carpenter)*, 205 B.R. 600 (B.A.P. 9th Cir. 1997) (decided under Section 1823(e)).

APPENDIX

62 Fed. Reg. 5984

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arraignments of a Depository Institution Prior to Receivership

[Monday, February 10, 1997]

---

* * * * *

Introduction

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: (1) The statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and (2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an

addendum are "Guidelines For Use of *D'Oench* and Statutory Provisions" (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections. [*]

Background

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protection FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the "*D'Oench* doctrine".

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, Section 2[13](e), 63 Stat. 899 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97-320, Section 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

---

* The Guidelines referred to in the text are not reprinted here, but may be found at 62 Fed. Reg. 5985-5988.

In August 1989, as part of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Public Law 101-73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

(A) Is in writing,

(B) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) Was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) Has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e)

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)((9)(A)), which states, in relevant part, that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim

against the receiver or the [FDIC in its corporate capacity]."

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,[1] these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (section 1823(e))—is *not* a "requirement" that section 1823(e) imposes on those agreements, which if not "met" renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: (1) Allows federal and state bank examiners to

---

[1] The Guidelines have been in effect since late 1994.

rely on an institution's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley* v. *FDIC*, 484 U.S. 86, 91-92 (1987).

In interpreting the meaning of "agreement" in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: "We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes." *Langley*, 484 U.S. at 92-93. In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases.[2]

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of sec-

---

[2] Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. See *John* v. *RTC*, 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen* v. *Sparks*, 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts and, consequently, as discussed *infra*, sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

tion 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA's enactment.[3]

No provision within FIRREA addressed the temporal reach of section 1821(d)(9) or section 1823(e) (as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed by the parties to such agreements.[4] Under the principles articulated by the Supreme Court in *Landgraf*, Congress must therefore be presumed to

---

[3] See *Oklahoma Radio Assocs.* v. *FDIC*, 987 F.2d 685, 695-96, *motion to vacate denied*, 3 F.3d 1436 (10th Cir. 1993); *Murphy* v. *FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting FDIC's concession in that regard).

[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460.

have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[5] Thus, because the statutory provisions establish "a categorical recording scheme" (see *Langley*, 484 U.S. at 95) and *D'Oench* is an equitable doctrine (*id.* 93-95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

---

[5] The retroactivity of FIRREA, however, is not determined on an all-or-nothing basis. There is no "reason to think that all the diverse provisions of the [statute] must be treated uniformly for" purposes of the retroactivity analysis. *Landgraf* v. *USI Film Prods.*, 521 U.S. at 280, 114 S. Ct. at 1505. Moreover, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1499.

FDIC Statement of Policy

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D'Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC's Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, DC, this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,
Executive Secretary.

* * * * *